No. 82-1793

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD and DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

Petitioner,

v.

LEWIS-WESTCO COMPANY

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS

Brief of the State of Oregon, Amicus Curiae, in Support of the Petition of the State of California for a Writ of Certiorari

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AMICUS BRIEF

Amicus respectfully urges the Court to issue a writ of certiorari to review the judgment and opinion of the California Court of Appeals in *Lewis-Westco Company v. Alcoholic Beverage Control Appeals Board*, 136 Cal App3d 829, 186 Cal. Rptr. 552 (1982).

STATEMENT OF INTEREST

The State of Oregon regulates the intrastate activities of the liquor industry pursuant to statutes enforced by a state administrative agency which has promulgated regulations requiring wholesalers to post liquor prices. Oregon presents this amicus brief, sponsored by the Oregon Attorney General, on behalf of the Oregon Liquor Control Commission.

Oregon has a particular interest in this case. The California Court of Appeals erroneously has held that California statutes and regulations, similar to those enforced by the Oregon Liquor Control Commission, have the effect of establishing a system of price-fixing which violates the Sherman Antitrust Act. Officials of the Oregon Liquor Control Commission are defendants in federal district court litigation challenging Oregon's liquor price-posting regulations as violative of the Sherman Antitrust Act. *Miller, et al. v. Hedlund* (D. Or. No. 78-259-FR).

Oregon's price posting regulations, as do those of California, prohibit price discrimination and require liquor wholesalers to post their price schedules with a state agency. The price schedules are public records. In certain instances, the regulations further require that the posted price remain in effect for specific, minimum periods of time. Plaintiffs in the

Oregon litigation contend that the regulations effect unlawful price fixing.

Like California law, however, Oregon's regulations neither compel nor enforce agreement among wholesalers regarding prices. These regulations only require liquor wholesalers to take the action of posting their prices in order that the state might achieve permissible objectives of economic regulation. If allowed to stand, the misanalysis of the pertinent issues by the California court will be spread across the country to cast unwarranted doubt upon the regulatory schemes of Oregon and the other states which similarly regulate the liquor industry.

SUMMARY OF ARGUMENT

Petitioners appropriately and persuasively seek this Court's review of several significant issues which now frequently arise when state liquor regulations are attacked as being in restraint of trade. Amicus writes to draw this Court's attention to the significance of the California court's erroneous analysis of the question of whether the state action exemption from the proscriptions of the Sherman Antitrust Act should have been applied. The Court should grant certiorari to address this pivitol jurisdictional issue which is a matter of immediate concern to the states and question of first impression in this Court.

The Court should grant review to make it clear that the two-pronged test of the "state-action exemption" enunciated in *Parker v. Brown*, 317 U.S. 341 (1943) and discussed in *California Liquor Dealers v. Midcal Aluminium*, 445 U.S. 97 (1980) is not the proper test for exemption in cases such as this *where state administrators are sued* to restrain their enforcement of state liquor regulations. Even if this Court is convinced the two-pronged test of "state action" should be applied when state administrators are forced to defend their right to enforce state liquor regulations, the Court should take this opportunity to hold that the "active state supervision" prong of that test can be met solely by the rational relationship of the regulations to the promotion of state statutory policies. The Court should also articulate the appropriate standard of judicial review in cases such as this. The Court should reject any test which requires judicial weighing of the value of such policies or an assessment of the degree of the utility of the regulations which purportedly effect those policies. The Court should grant certiorari review to announce that official state action pursuant to state statutes and regulations qualifies for exemption from the Sherman Antitrust Act if the state demonstrates that its statutes and regulations are rationally related to the advancement of legitimate state policies.

ARGUMENT

SUPREME COURT REVIEW SHOULD BE GRANTED TO RESOLVE CONFLICTS IN DECISIONS REGARDING THE EXEMPTION OF STATE ACTION FROM THE PROSCRIPTIONS OF THE SHERMAN ANTITRUST ACT.

The petition for writ of certiorari outlines the several analytical errors of the California Court of Appeals and lists a number of significant reasons which should prompt this Court to grant review of the California court's holding that the state's liquor price-posting laws and regulations violated the Sherman Antitrust Act. Amicus agrees with the many points raised in the petition. However, we limit our brief to the jurisdictional error and implications of the lower court's holding that the state action exemption from the Sherman Antitrust Act did not apply because the state was insufficiently involved in its price-posting system of liquor regulation.

Decisions of this Court have established two requirements for "state action immunity" from the antitrust provisions of the Sherman Antitrust Act as interpreted in *Parker v. Brown*, *supra*. The challenged restraint of trade must be "one clearly articulated and affirmatively expressed as state

policy" and the policy must be "actively supervised" by the state. *City of Lafayette v. Lousiana Power & Light Co.*, 435 US 389 (1978) (opinion of Brennan, J.). This Court addressed the question of the application of the *Parker v. Brown* criteria in the context of its review of California's wine-pricing system in *California Liquor Dealers v. Midcal Aluminum*, 445 US 97 (1980) [hereinafter referred to as "Midcal"]. The Court held that the California program did not meet the second requirement for *Parker* immunity because the state merely authorized price setting and enforced prices established by private parties. 445 US at 105-106. However, as the petition for certiorari in the present case correctly points out, "* * * the meaning of 'active state supervision' is a subject of conflict in the lower courts." (Pet., 16).

The petition notes the conflict between Ninth Circuit and Second Circuit decisions on this question. (*Id.*). Amicus State of Oregon also notes that within the Ninth Circuit alone there is considerable disagreement among the decisions respecting the proper application of *Midcal* to state defendants.

As petitioner states (Pet., 16), the Ninth Circuit held in *Miller v. Oregon Liquor Control Commission*, 668 F2d 1222 (9th Cir. 1982), that a state must be involved in the actual setting of the prices charged for liquor in order to qualify for the state exemption when it is sued under the Sherman Antitrust Act.

This case, presently pending in the district court on remand under the title *Miller v. Hedlund*, *supra*, arose in 1978 when two tavern owners sued Oregon and several manufacturers and wholesalers of liquor and alleged a conspiracy and restraint of trade, in violation of section 1 of the Sherman Antitrust Act. The complaint asked for damages and injunctive relief. The plaintiffs alleged that the defendants had sought to raise and stabilize beer and wine prices by permitting and requiring beer and wine wholesalers to post their price changes ten days before the changes went into effect, thereby allowing exchange of that information. The conduct sought to be enjoined was predicated upon state administrative rules. These rules have been in effect for many years. The price posting regulations expressly refer to the enforcement of the state statutes prohibiting "financial assistance" by wholesalers of retailers and include separate provisions which require that prices be uniform for the same class of trade buyers. One of the aims of the regulations is to maintain the three-tiered system of the liquor industry in Oregon; another goal is to protect retailers from predatory pricing tactics which might otherwise be employed by wholesalers seeking to control retailers. The states' general regulatory objective in requiring price-posting are well summarized in California's petition for certiorari at pages 4-5.

The Ninth Circuit, citing *Midcal*, held, on a bare record, that the Oregon regulations were not entitled to exemption from Sherman Antitrust Act proscription because Oregon did not "actively supervise" its own policies:

> "* * * Oregon mandates the posting of prices to be charged by each wholesaler, but does not in any way review the reasonableness of the prices set. While the Commission 'may reject any price posting which is in violation of its rules,' Rule 210(1)(b), the effect of the rule is simply to effectuate the price posting and the prohibitions on quantity discounts and transportation allowances. It does not provide for government establishment or review of the prices themselves. * * *" *Miller v. Oregon Liquor Control Commission*, *supra*, 688 F2d at 1227 (1982).

Thus, in *Miller v. Oregon Liquor Control Commission*, the Ninth Circuit, like the California court in the present case extended *Midcal* and applied the "state action" exemption to a determination whether the state *itself* is exempt from actions predicated upon an alleged violation of the Sherman Antitrust Act. This extension of *Midcal* was erroneous.

The Ninth Circuit's *Miller* decision is a clear departure from the approach it took in *State of New Mexico v. American Petrofina, Inc.*, 501 F2d 363 (1974). In *American Petrofina*, New Mexico sued an oil company and five other asphalt suppliers for alleged antitrust violations. The oil company counterclaimed, alleging that the state and some of its

political subdivisions conspired as consumers to fix prices and eliminate competition among themselves in violation of the Sherman Antitrust Act. The state asserted immunity from the Sherman Antitrust Act in response to the counterclaim. Shell argued that, under *Parker v. Brown*, *supra*, the state's immunity extended only to situations where the legislature had mandated an alternative to competition as the highest good of an industry. The Ninth Circuit rejected Shell's argument. The court said that the "legislative mandate" would be useful in determining whether an antitrust defendant or regulatory scheme was actually an instrument of the state. The court held, however, that in an antitrust suit directly against a state, there could be no doubt that conduct by the state was at issue. 501 F2d at 369-370. In such a case, the court concluded, a state was "not covered" by sections 1 and 2 of the Sherman Antitrust Act. 501 F2d at 371.

In *Ronwin v. The State Bar of Arizona*, 686 F2d 692 (1981), the Ninth Circuit had applied the two-pronged test of state action in a Sherman Antitrust Act suit to determine whether the state bar of Arizona was qualified for antitrust immunity. *Id*, 686 F2d at 697. The plaintiff had failed the Arizona bar examination and the Arizona Supreme Court had refused to review the exam. This court had denied certiorari. *Ronwin v. Committee on*

Examinations and Admissions, 419 US 967 (1974). Ronwin then had claimed a violation of section 1 of the Sherman Antitrust Act on the ground that the defendant had illegally restricted competition among attorneys practicing in Arizona because, allegedly, the committee's grading system was based upon admission of a predetermined number of persons, without reference to achievment by each bar applicant of a pre-set standard of competence. Contrary to its decision in *American-Petrofina* and purportedly on the authority of subsequent Supreme Court decisions including *Midcal*, the Ninth Circuit did not find sufficient state action merely because the committee was established by Supreme Court rule and was composed of members selected by the Arizona Supreme Court:

> "* * * Although the defendants in the United States Supreme Court's state-action decisions were public bodies, or subdivisions of the state, that did not end the Court's analysis. The Court still looked to see whether the challenged restraints were clearly articulated and affirmatively expressed as state policy and were actively supervised by the state acting as sovereign. * * *" *Ronwin v. The State Bar of Arizona*, *supra* 686 F2d at 697 (1981).

Judge Ferguson, in dissent, properly criticized the application of the two-pronged test in an antitrust action against a state agency. After taking note of Tenth Amendment problems posed by the majority's holding, Judge Ferguson said

> "The majority applies erroneous standards to determine whether an agency of the state * * * is exempt from antitrust laws. The majority incorrectly applies a test of compulsion by asking whether the action of the Committee was *required* by the state supreme court. The majority answers: Like the defendants in *Goldfarb*, [*v. Virginia State Bar* 421 US 773 (1975)] the defendants here have no statute or Supreme Court Rule to point to as directly *requiring* the challenged grading procedure." Maj. Op., *ante*, at 696 (emphasis added).
>
> "However, the test of compulsion in *Goldfarb*, *supra*, applied only to *private conduct* of the county bar association and to the State Bar's joinder in that private conduct. * * *" *Id*, 686 F2d 705-06. (Emphasis supplied).

Judge Ferguson then appropriately quoted Areeda, *Antitrust Immunity for "State Action" After LaFayette*, 95 Harv. L. Rev., 435, 438 n. 19, 445 n. 49 (1981):

> "Compulsion is not necessary in cases of *public* defendants. Immunity for decisions of subordinate agencies or officials cannot depend on an explicit command from the Legislature; delegation of governmental powers necessarily includes the discretion to make decisions not compelled by the Legislature."

Judge Ferguson also questioned the majority's belief that an additional element of the immunity test was whether the state policy is "actively supervised by the state itself." 686 F2d at 706, n. 4. He noted Professor Areeda's observation that this Court had not yet required that governmental acts be supervised by the state and correctly stated:

"The cases cited by the majority did not apply the supervision test to public defendants." *Ronwin v. The State Bar of Arizona, supra*, 686 F2d at 706, n. 4.

Since the Ninth Circuit's *Ronwin* decision, at least one U.S. District Court within the Ninth Circuit has followed the approach taken in *American Petrofina* and Judge Ferguson's *Ronwin* dissent in recognizing state action immunity when the state itself is the defendant. *Deak-Perera Hawaii v. Dept. of Transp., etc.*, 553 F. Supp. 976 (1983). In *Deak-Perera*, the plaintiff alleged that the Hawaii Department of Transportation and its state officials had violated federal antitrust laws by issuing an exclusive lease for the foreign exchange concession at the Honolulu International Airport. Judge Pence correctly ruled that the two-pronged test was not relevant to determine state-action immunity where the state itself was the defendant:

"More recent Ninth Circuit cases and the United States Supreme Court cases since 1974 have indicated that there now is even more than a 'valid argument' against 'automatically' giving counties and cities state-action immunity. Such political subdivisions may be subjected to the *Midcal* analysis. However, nothing since *Petrofina* has erroded its central theme that when it is the state itself being sued for acting, then it is entitled to *Parker* immunity against the Sherman Antitrust Act and the *Midcal* analysis is 'unnecessary'." 553 F. Sup. at 982.[1]

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[1]Nevertheless, Judge Pence applied the two-prong test and demonstrated that it was unnecessary in an antitrust action brought against the state:

(Continued on next page)

The approach taken by the district court properly comports with the rationale of *Parker v. Brown*. The Ninth Circuit's reasoning in *Miller v. Oregon Liquor Control Commission*, *supra* does not. The rationale of that decision may be reviewed by this court when it reviews the Ninth Circuit's decision in *Ronwin* under the title of *Ronwin v. Hoover*, (S Ct No. 82-1474) *cert. granted*, ___ US ___ , 51 USLW 3825 (May 16, 1983). Because the California Court of Appeals employed a similarly questionable rationale in the decision review of which is sought here, the writ of certiorari should be allowed to settle the question of state immunity from antitrust suit in the context of liquor law enforcement.

If the Court deems application of the two-pronged test of "state action" appropriate even when a Sherman antitrust action is directed against state agencies or state administrators acting in their official capacities, the Court should grant review in this case. The Court then should decide whether a state must demonstrate, as *Midcal* arguably seems to require, a pointed reexamination of the effects which the regulations have on the economy. Amicus

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"For reasons heretofore stated, this court has considered and applied a *Midcal* analysis. The application of the superfluous analysis confirms this court's earlier conclusion. When the state is acting through one of its instrumentalities, the *Midcal* analysis logically should be satisfied automatically. The *Midcal* two-pronged test having been met, the DOT's actions are entitled to the same *Parker v. Brown* immunity to antitrust suits as the state."

contends that it is inappropriate to require states to demonstrate "active supervision" in these terms. A state statute is not preempted by the Sherman Antitrust Act simply because the state's scheme might have an anti-competitive effect. *Rice v. Norman Williams*, ___ U.S. ___ , 73 L. Ed2d 1042, 102 S. Ct. 3294 (1982). As pointed out by Justices Rehnquist and O'Conner in their dissenting opinion in *Community Communications Co. v. Boulder*, 455 U.S. 40, 66, 70 L. Ed2d 810, 828, 102 S. Ct. 835 (1982):

> "* * * Competition simply does not and cannot further interests that lie behind most social welfare legislation. Although state or local enactments are not invalidated by the Sherman Antitrust Act merely because they may have anti-competitive effects, *Exxon Corp. v. Governor of Maryland*, *supra*, at 133, 57 L. Ed2d 91, 98 S. Ct. 2207, this court has not hesitated to invalidate such statutes on the basis that such a program would violate the antitrust laws if engaged in by private parties." (Cases cited).

Assuming that state defendants must satisfy the two-pronged test to acquire the exemption from Sherman Antitrust Act suits, it should be sufficient for them to demonstrate that their pertinent state statutes and regulations are rationally related to legitimate state economic objectives. The courts should not be permitted "to substitute their social and economic beliefs for the judgment of legislative bodies, who are likely to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). Nor should a

court be permitted to weigh how well state regulations advance state purposes, so long as a rational relationship can be demonstrated.

CONCLUSION

The current state of the law, at least in the Ninth Circuit, with respect to the state's right to regulate the liquor industry is fraught with uncertainty. Cases construing Section 2 of the Twenty-First Amendment appear to have conferred broad authority on the states to regulate the liquor industry within their borders. However, since *Midcal*, there has been uncertainty concerning the reach of federal power under the Commerce Clause and the Sherman Antitrust Act. Furthermore, there is uncertainty whether state defendants must meet, like non-state defendants, the two-prong test of "state action" to secure the shelter of *Parker v. Brown*. Review of the decision of the California Court of Appeals by this Court will resolve these

uncertainties. The petition for certiorari should be granted.

Respectfully submitted,

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